LIBRARY
SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM 1948

No. 132

THE UNITED STATES, *Petitioner*

v.

RICHARD S. CORS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT, RICHARD S. CORS

JOHN LORD O'BRIAN
FRANK C. MASON
Counsel for ~~Petitioner~~ Respondent

HAROLD A. KERTZ
JOHN G. LAYLIN
CHARLES A. HORSKY
DONALD HISS
Of Counsel

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Statement	2
Questions Presented	6
Summary of Argument	6
Argument	9
I. Section 902(a) of the Merchant Marine Act of 1936, as Amended in 1939, Adopts Rules Theretofore Established by the Courts in Determining Just Compensation	14
A. The Language of Section 902(a) Supports Respondent's Construction	14
B. The Legislative History Supports Respondent's Construction of Section 902(a)	17
C. Several Rules of Statutory Interpretation Support Respondent's Construction of Section 902(a)	22
D. Petitioner's Construction of Section 902(a) is Open to Several Serious Objections	30
1. Congress Could Scarcely Have Intended Any of the Vague and Arbitrary Interpretations Which Petitioner Brings Forward	30
2. Petitioner's Interpretations Would Produce Unfair and Unreasonable Results	34
II. Petitioner's Construction of Section 902(a) Raises Serious Doubts as to its Validity Under the Fifth Amendment	38
III. On the Facts Found in This Case, the Judgment Below should Be Affirmed	49
Conclusion	56
Appendix A. Letter from Chairman Land of Maritime Commission to Chairman Bland of House Committee on Merchant Marine and Fisheries	57
Appendix B. Notice from War Shipping Administration to Owners of Requisitioned Vessels	61
Appendix C. Letter from Secretary of State to War Shipping Administration	65

CITATIONS

Cases:

Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937)	22
Ashwander v. TVA, 297 U. S. 288 (1936)	50
B. & O. R.R. v. United States, 298 U. S. 349 (1936)	23
Bauman v. Ross, 167 U. S. 548 (1897)	42
Boom Co. v. Patterson, 98 U. S. 403 (1879)	42
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 (1934)	55
Bowles v. Willingham, 321 U. S. 503 (1944)	38, 39
Chicago, B. & Q. R.R. v. Chicago, 166 U. S. 226 (1897)	43, 44
Cincinnati v. Vester, 281 U. S. 439 (1930)	50
Clark v. Uebersee, 332 U. S. 480 (1947)	23

PAGE

Commonwealth v. Huon Transport Proprietary Ltd., 70 C. L. R. 293 (1945) 48
Ex parte *Endo*, 323 U. S. 283 (1944) 22, 39
Girouard v. United States, 328 U. S. 61 (1946) 27
Grace Brothers Proprietary Ltd. v. Commonwealth, 72 C. L. R. 269 (1946) 47
Helvering v. Griffiths, 318 U. S. 371 (1943) 23
Interstate Busses Corp. v. Blodgett, 276 U. S. 245 (1928) 55
Lichter v. United States, 334 U. S. 742 (1948) 38
Liverpool, N. Y. & P. Steamship Co. v. Commissioners of Emigration, 113 U. S. 33 (1885) 50
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935) 39
Markham v. Cabell, 326 U. S. 404 (1945) 23
McGovern v. New York, 229 U. S. 363 (1913) 44
Minister of State for the Army v. Dalziel, 68 C. L. R. 261 (1944) 45, 46
Minister of State for the Army v. Pacific Hotel Proprietary Ltd., 68 C. L. R. 310 (1944) 46
Minister of State for the Navy v. Rae, 70 C. L. R. 339 (1945) 47, 48
Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893) 8, 22, 39, 42
Olson v. United States, 292 U. S. 246 (1934) 39, 42
Omnia Commercial Co. v. United States, 261 U. S. 502 (1923) 16
The Petar, 68 F. Supp. 296 (S.D.N.Y. 1946), *aff'd sub nom. Ozanic v. United States*, 165 F. 2d 738 (C. C. A. 2d 1948) 35, 36
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 (1894) 23
Roberts v. New York City, 295 U. S. 264 (1935) 44
Roland Electrical Co. v. Walling, 326 U. S. 657 (1946) 24
Seaboard Air Line Ry. v. United States, 261 U. S. 299 (1923) 23, 42
Sharp v. United States, 191 U. S. 341 (1903) 16
Shoemaker v. United States, 147 U. S. 282 (1893) 15, 16
Skidmore v. Swift & Co., 323 U. S. 134 (1940) 24
Sonzinsky v. United States, 300 U. S. 506 (1937) 21
Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U. S. 146 (1925) 36
Tennessee Pub. Co. v. American National Bank, 299 U. S. 18 (1936) 9, 55
United States v. Am. Trucking Assoc., 310 U. S. 534 (1940) 24
United States v. Bethlehem Steel Corp., 315 U. S. 289 (1942) 38
United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913) 15, 16, 42
United States v. CIO, 335 U. S. 106 (1948) 22
United States v. Constantine, 296 U. S. 287 (1935) 21
United States v. John J. Felin & Co., 334 U. S. 624 (1948) 40
United States v. Miller, 317 U. S. 369 (1943) 5, 7, 14, 19, 23, 39, 42, 47
United States v. New River Collieries Co., 262 U. S. 341 (1923) 23, 42
United States v. Petty Motor Co., 327 U. S. 372 (1946) 15, 41
United States v. United Mine Workers, 330 U. S. 258 (1947) 20
United States ex rel. *TVA v. Powelson*, 319 U. S. 266 (1943) 42, 43

Constitution and Statutes:

Act of June 6, 1941, 55 Stat. 242 12
British Compensation (Defence) Act, 1939, 2 & 3 Geo. 6, ch. 75 45
Constitution of the United States, Fifth Amendment 6, 14, 39

PAGE

General Requisition Act of 1941, 55 Stat. 742 35
Lend-Lease Act of 1941, 55 Stat. 31 32
Merchant Marine Act of 1928, 45 Stat. 689 17
Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 52 Stat. 962, and 53 Stat. 1255, 46 U. S. C. §§ 1212, 1242 ..... 2, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 21, 37, 50, 51
Naval Appropriation Act of 1947 § 202, 60 Stat. 481, 501 4

Miscellaneous:

22 Comp Gen. 497 (1942) 10
80 Cong. Rec. 9335, 9885, 10070-10071 17
Executive Order 9054, February 7, 1942, 7 Fed. Reg. 837, 3 CFR (Cum. Supp. 1943) 1086-1088 4
Executive Order 9387, Oct. 15, 1943, 8 Fed. Reg. 14105 ..... 5, 11
Executive Order 9611, Sept. 10, 1945, 10 Fed. Reg. 11637 ..... 5, 31
Executive Order 9627, Sept. 24, 1945, 10 Fed. Reg. 12113 ..... 5, 31
H. R. Rep. No. 660, 76th Cong., 1st Sess. (1939) 18
Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4983, 76th Cong., 1st Sess. (1939) 25, 26, 28, 29
House Merchant Marine and Fisheries Committee Document No. 20 (entitled Compilation of Material on the Determination and Payment of Just Compensation for Vessels Requisitioned under Section 902 of the Merchant Marine Act, 1936) 11, 36, 37, 48
Rules of the Advisory Board on Just Compensation 5, 12, 31, 32
Sen. Rep. No. 678, 76th Cong., 1st Sess. (1939) 18
Sen. Rep. No. 1813, 77th Cong., 2d Sess. (1942) 21

Supreme Court of the United States

OCTOBER TERM 1948

No. 132

THE UNITED STATES, *Petitioner*

v.

RICHARD S. CORS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT, RICHARD S. CORS

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) is reported at 110 Ct. Cl. 66.

JURISDICTION

Judgment for respondent (plaintiff below) was entered by the Court of Claims on January 5, 1948 (R. 18). A motion of petitioner (defendant below) for a new trial was overruled on April 5, 1948 (R. 18). The petition for a writ of certiorari was granted by this Court on October 11, 1948. The jurisdiction of this Court rests upon the provisions of Section 3 (b) of the Act of February 13, 1925, as amended (now repealed), and upon 28 U. S. C. 1255 (1).

STATUTE INVOLVED

This suit involves Section 902 of the Merchant Marine Act, 1936, as amended in 1939, 46 U. S. C. 1242. The pertinent portions of this section of the Act are set forth in Appendix A to petitioner's brief, pages 129, 132.

STATEMENT

Respondent was the owner of a tugboat, the *MacArthur*, which was requisitioned by the War Shipping Administration on October 15, 1942, pursuant to the authority of the Merchant Marine Act of 1936, as amended. Not being satisfied with the amount offered for the *MacArthur* by the War Shipping Administration, the respondent, in accordance with the provisions of the Act, was paid 75 per cent of the amount offered, and instituted suit in the Court of Claims for the balance claimed to be due as representing just compensation (R. 1-4).

The pertinent facts found by the Court of Claims are as follows:

The *MacArthur*, then named the *Guthrie*, was built in 1895 at Baltimore, Maryland, for the United States Coast Guard, and thereafter was continuously owned by the United States until March, 1942. Until November 1939 the vessel was stationed in Baltimore harbor and used by the Coast Guard as a boarding tender or tug to transport immigration, customs and health officers from the port to vessels arriving in the harbor (R. 5, 6). In the latter part of 1939 the *Guthrie* was transferred from Baltimore harbor to the Coast Guard base at Portland, Maine, and thereafter a special Board of Survey was appointed by the Coast Guard to ascertain the condition of the vessel and make recom-

mendations regarding her disposition or repair. On September 13, 1941, the Board concluded that "under normal conditions and, considering the age of the vessel, the expense of putting this vessel in operating condition would not be justifiable and that the vessel should be placed out of commission . . ." (R. 7, 8). The Board continued, however, in its recommendations, that "due to the present emergency and the great need of vessels, it is believed that necessary repairs should be made . . .". If such repairs should have been made, it was the view of the Board "that three or four years satisfactory service could be had from this vessel" (R. 8).

Notwithstanding this recommendation, Coast Guard headquarters directed that the *Guthrie* be sold. The sale was conducted as an open market transaction, and on March 19, 1942, the respondent, being the highest bidder, acquired the *Guthrie* from the United States for the sum of $2,875 (R. 8). Thereafter certain repairs and improvements were made to the vessel, part of the work being performed by the respondent and a crew of men working under his supervision, and part being performed by a shipyard at Portland, Maine. Respondent "expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had all of the work been performed by a shipyard at the abnormally high rates being charged at that time" (R. 8, 9).

Following the completion of the repairs and improvements, the vessel was licensed by the Department of Commerce for the coasting trade. She then sailed to New York, and her name was changed from *Guthrie* to *MacArthur* (R. 9).

In September 1942 an officer of the United States Navy surveyed the *MacArthur* "for the purpose of determining

her suitability for use . . . as a 'steam heating plant' for heating and pumping' fuel oil from oil barges into combat vessels of the Navy" (R. 9).

The War Shipping Administration[1] requisitioned the *MacArthur* on October 15, 1942. After her requisition the vessel was used by the Navy for the purpose for which she had been surveyed (R. 10).

The War Shipping Administration determined the amount of $9,000 to be just compensation and offered that sum to the respondent. Upon rejection of the award by the respondent, 75 per cent of the amount awarded was paid to the respondent and suit was instituted for the balance due (R. 5).

The Court of Claims found that "the fair market value of the *MacArthur* at the time and place of the taking is the sum of $15,500" (R. 12) and judgment was ordered on the basis of that finding.

The Court of Claims further found that the combination of three conditions created a demand for and a shortage of tugs, with the result that the market value of the *MacArthur* on October 15, 1942, was $5,000 higher than that prevailing on September 8, 1939. During the intervening period there was "a general rise in the market value of nearly all ships in and about the port of New York" (R. 12, 13).

---

[1]Executive Order 9054, February 7, 1942 ("Establishing a War Shipping Administration in the Executive Office of the President and Defining Its Functions and Duties") (7 FED. REG. 837, 3 CFR (Cum. Supp. 1943) 1086-1088) transferred certain powers and functions of the Maritime Commission under the Merchant Marine Act, including those pertaining to requisition, to the War Shipping Administration. Section 202 of the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 STAT. 481, 501, retransferred these powers to the Maritime Commission as of August 30, 1946.

The three specific conditions working in combination which caused this general market rise from September 1939 to October 1942 were: (1) "the demand for vessels which followed the outbreak of war in Europe"; (2) "the Government's need for vessels, which necessitated the taking of many vessels"; and (3) "the great increase in shipping and in harbor traffic which occurred during the period of the war" (R. 12, 13).

After making these findings the Court of Claims held: "Since plaintiff [respondent] could have gotten for his vessel $15,500 from private persons for their own use, he is entitled to no less from the Government" (R. 17).

The petitioner concedes that "The United States did not, and does not now, contest the finding that on October 15, 1942, respondent could have sold the vessel to other potential purchasers for $15,500" (Petitioner's Brief, p. 9).

In the course of its opinion the court reasoned that neither the case of *United States v. Miller*, 317 U. S. 369 (1943), the rules of the Advisory Board on Just Compensation,[2] nor the Merchant Marine Act of 1936, as amended, "require us to abandon or to modify in this case the standard of market value laid down by the Supreme Court" in a series of cases cited by the court (R. 17). Specific findings were made on the several requirements laid down in *United States v. Miller, supra* (R. 13, 15-17).

---

[2]The rules promulgated by the Advisory Board on Just Compensation established by Executive Order 9387 of October 15, 1943, 8 FED. REG. 14105, and the rules promulgated by the Board reestablished by Executive Order 9611 of September 10, 1945, 10 FED. REG. 11637 (as amended by Executive Order 9627, September 24, 1945, 10 FED. REG. 12113), are printed in Appendices B and C to Petitioner's Brief, pp. 136 and 142.

QUESTIONS PRESENTED

Respondent's tugboat was requisitioned in October 1942 pursuant to the provisions of Section 902 of the Merchant Marine Act of 1936, as amended in 1939. That section provides, in part, that the owner "shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." The questions presented are:

1. Did not the court below properly base its decision on: the value of the vessel at the time and place of taking, excluding elements of appreciation in value heretofore excluded in judicial determinations of just compensation, *i.e.*, (a) any increase in value due to the ship's special adaptability to the owner's use, (b) any increase due to the ship's peculiar fitness for the taker's purposes, and (c) any value resulting from the probability that the vessel would be requisitioned by the Government for wartime activity?

2. Did not the court properly refuse to exclude additional elements of appreciation in value?

3. Would not an interpretation of Section 902 requiring the exclusion of elements of appreciation in value in addition to those heretofore excluded in judicial determination of just compensation give rise to serious doubt as to the validity of Section 902 under the Fifth Amendment to the Constitution?

SUMMARY OF ARGUMENT

I

Section 902(a) of the Merchant Marine Act of 1936, as amended in 1939, adopts the rule established by the

courts in determining just compensation. These rules, recently reiterated in *United States v. Miller*, 317 U. S. 369 (1943), exclude certain elements of enhancement in value in any just compensation case. Properly interpreted, Section 902(a) admonishes the administering agencies to follow these judicial standards.

This interpretation is fully supported by the legislative history. In particular, the amendments in 1939, one of which changed the words "fair actual value" to "just compensation" were specifically stated by the congressional committees to be for the purpose of making certain that the courts would not be controlled by any assumed legislative formula. The petitioner advances nothing to contradict this unequivocal declaration.

Moreover, petitioner's attempt to substitute a legislative for the prevailing judicial formula squarely conflicts with several canons of statutory construction in its interpretations of Section 902(a). Unquestionably it raises a serious constitutional question which is wholly avoided by respondent's interpretation. Second, it nullifies and emasculates portions of the section. Third, it ignores not only contemporaneous construction of the statute by the agency charged with the administration of the statute, but also the fact that that agency was the motivating factor behind the 1939 amendments explained in the committee reports.

Finally, petitioner's construction raises a serious question whether Congress could possibly have intended the vague, arbitrary and conflicting interpretations which petitioner advances. That petitioner's construction would produce unfair and unreasonable results is obvious. We cannot believe that Section 902(a) requires the courts to reach results so unreasonable and to ascribe to Congress the intent to be unfairly discriminatory and capricious.

II

The constitutional objections to petitioner's interpretations of Section 902(a) are sufficiently serious to warrant full treatment. Unquestionably existing law requires that just compensation be paid and that the courts and not the legislature are to determine the measure of that just compensation. *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893). The doctrine has been affirmed and reaffirmed on numerous occasions.

Petitioner cites nothing to the contrary. The decisions involving appeals to this Court from state court condemnation proceedings are not in conflict since in every case the statute or constitutional provision involved provided for the payment of just compensation or its equivalent. The cases held no more than that the Court could not inquire into every detail of a judicial proceeding carried through by an established court acting under an approved rule of law.

Nor is petitioner aided by its reference to material from foreign countries. Some of them have no due process or just compensation clause. In Australia, the law appears to be directly contrary to petitioner's assertion. Furthermore, respondent agrees with the State Department and the War Shipping Administration that Congress did not intend to require our Government to fail in its international responsibilities or to create a precedent which might invite expropriation of American property abroad with inadequate compensation.

III

We feel it incumbent on us to call to the Court's attention that on the facts found in this case the judgment below

should be affirmed on any construction of Section 902(a). Clearly that is true if respondent's interpretation is correct. In addition, however, it appears impossible to accept the contention that the Government could, as it did here, sell a ship at an enhanced value in March 1942, and requisition it in October 1942 at its 1939 value.

Petitioner's attempt to avoid this result by arguing that most of the enhancement occurred between March and October 1942 does not make sense. The record is barren of any evidence that the value of the ship was enhanced during those months due to any of the causes which petitioner contends are to be excluded. In fact, the record shows that it was the action of respondent in preparing, reconditioning, converting and moving the vessel which resulted in its larger value.

Moreover, there can be no doubt that even were petitioner to evolve a theory upon which its interpretations of Section 902(a) would prevail on this record, the issue is not squarely and unequivocally presented, and is not appropriate for a decision of the issues which petitioner urges. *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18, 22 (1936).

ARGUMENT

The controversy in this case revolves around the proper interpretation of Section 902 of the Merchant Marine Act of 1936, as amended in 1939, which reads in part as follows:

> "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use."

Respondent's position can be simply stated: Congress, in enacting this section, was doing no more than instructing the administering agency to adopt the concepts established by the courts in deciding just compensation cases under the Fifth Amendment. That is the view adopted by the court below.

Petitioner's position is not only impossible of simple statement, but is far from clear. It evolves from a background of administrative conflict which has "raged," as petitioner puts it, for many years, and still goes on. Although the several administrative views are necessarily discussed more fully below, no understanding of the issue here is possible without a brief summary of that controversy.

The first construction of Section 902(a) was, obviously, by the agencies administering it—the Maritime Commission and the War Shipping Administration. They adopted the view which respondent now urges, and which the court below adopted: that the statute was a legislative mandate to pay as much, but no more, than a court would award under the Fifth Amendment. Elements of enhancement in value heretofore adopted by the courts were, of course, excluded. This view prevailed from the time the 1939 amendments became effective until November 28, 1942. See Appendices A and B, *infra*.

On this latter date, however, the Comptroller General ruled that the War Shipping Administration was permitted to pay no more than the value of vessels as of September 8, 1939 (when a limited emergency was proclaimed by the President). 22 COMP. GEN. 497. This is one of the views advocated, and perhaps the one preferred, by petitioner in this case.

As a first effort to resolve this conflict, the War Shipping Administration requested and secured an opinion from

the former Attorney General, William D. Mitchell, as to the meaning of Section 902(a). In his opinion, dated February 11, 1943, Mr. Mitchell concluded that Section 902(a) does not limit compensation for requisitioned vessels to September 1939 values. He reasoned that no enhancement occurring before the War Shipping Administration had authority to requisition could be excluded, and that May 27, 1941 was the earliest date when the Administration had such authority. It may be noted that, on petitioner's own admission (Petitioner's Brief, p. 106) domestic ships' values reached their highest in May 1941, and hence questions of enhancement since then are purely academic. Mr. Mitchell concluded[3]:

> The validity of the statute depends on whether the *courts* are left free to award full 'just compensation' undiminished by any legislative formula. Section 902(d) fairly construed, gives such a remedy in the courts." (Italics in original.)

As a resolution of the controversy, the opinion was unavailing. Consequently, in 1943, in a further effort to resolve the controversy between the Comptroller General, on the one hand, and the War Shipping Administration on the other, the President appointed an Advisory Board on Just Compensation to determine rules for the guidance of the War Shipping Administration in administering Section 902(a). Executive Order 9387, October 15 1943 (8 FED. REG. 14105, 3 CFR (Supp. 1943), ch. II, pp. 48-49). The ruling of the Advisory Board, as originally announced, did little more than restate the language of Section 902(a), but noted that it was not appropriate to use September 8, 1939 as the starting point for determining excludable in-

---

[3] House Merchant Marine and Fisheries Committee Document 20, pp. 154, 157 (hereinafter cited as Document 20).

creases in value.[4] Two years later, because of inability to agree on what the Advisory Board had decided, it was reconstituted to clarify its original rules. Again the Board paraphrased the statutory language and again it disapproved of the September 8, 1939 date, without specifying a different one. In sum, the Board did not resolve the controversy. The War Shipping Administration read its rules as supporting the Administration's original position (as did the court below). The Comptroller General—and now the petitioner here—dissented.

Since the original controversy, the Department of State has expressed its accord with the original view of the War Shipping Administration, as applied to foreign vessels requisitioned under the Act of June 6, 1941, 55 STAT. 242, which incorporates by reference the applicable provisions of Section 902. See Appendix C, *infra*. Moreover, the Comptroller General has apparently somewhat modified his original views. We learn from petitioner's brief (pp. 112-113) that on November 3, 1948 (after certiorari was granted in this case) an inter-office memorandum indicated that the Comptroller General would approve an increase in awards over September 1939 values ranging

---

[4] In Rule 4 the Advisory Board said:

> "In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted" (Petitioner's Brief, pp. 139-140).

from 5 percent for 1940 to 33 percent for 1944. This rule of thumb, however, is not extended to vessels under 1,000 tons, and hence excludes the ship here involved.

As petitioner admits (Brief, pp. 125, 126), the controversy still continues. Perhaps because of that, petitioner has not, as we read its brief, adopted a position. There is no doubt that, in determining just compensation for a requisition under Section 902(a), petitioner would exclude from the value of the property at the time and place of taking some elements besides those which have been customarily excluded, in any event, by the courts. Here it sets forth two views—the Comptroller General's and its own interpretation of the Advisory Board order—and in effect requests the Court to choose between them.

That petitioner's view, or views, cannot be more simply stated or more precisely summarized we regard in itself as evidence not only of the unwisdom of departure from settled judicial doctrine, but also of the unlikelihood that petitioner correctly reflects the intention of Congress in enacting Section 902(a). With that, however, we deal below.

In our argument we first set out the established judicial doctrine, and indicate that, in every respect, Section 902(a) is no more than a summary restatement of it. Second, we show that our reading of Section 902(a) is fully supported by the legislative history of that section, and by the rules of statutory construction which are here applicable. Third, we illustrate the substantial objections which exist to any of petitioner's suggested readings of the section.

Finally, we feel it incumbent to call to the attention of the Court that, in our view, the facts in this particular case

may require an affirmance of the decision below on any reading of Section 902(a), and hence may make a decision on its proper meaning unnecessary. Logically, no doubt this point should be made first. Practically, it is difficult to make the point intelligently until the several positions have been fully explained in the course of the discussion of the question of interpretation. Consequently, and in order to meet squarely the issues raised by petitioner's brief, we have ventured to make this our concluding point.

We turn, then, to the details of the argument.

I

SECTION 902(a) OF THE MERCHANT MARINE ACT OF 1936, AS AMENDED IN 1939, ADOPTS RULES THERETOFORE ESTABLISHED BY THE COURTS IN DETERMINING JUST COMPENSATION.

A. THE LANGUAGE OF SECTION 902(a) SUPPORTS RESPONDENT'S CONSTRUCTION

Under the Fifth Amendment, just compensation must be paid when private property is taken for public use. Six years ago, in a unanimous opinion, the Court reviewed the cases which had carefully evolved the principles controlling the determination of just compensation, and said: "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U. S. 369, 373 (1943). In determining the precise indemnity to which an owner in any case is entitled, the Court there noted that "no general formula should be used for the purpose. In an effort, however, to find some practical standard the courts

early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what it fairly may be believed that a purchaser in fair market conditions would have given', or, more concisely, "market value fairly determined'" (p. 374).[5]

What is most important, however, is that the Court reiterated that not every element contained in the value of property at the place and time of requisition is to be included in an award. Where the property taken is especially adaptable to the owner's particular use or where the property has a peculiar fitness for the taker's purpose, such elements of value are not to be taken into consideration in determining just compensation. These limitations were made articulate at least as early as 1913 in *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53.

Moreover, when a public project is initiated and certain property expropriated, the owner of other property included within the general project is not allowed the increased value for his property when it is subsequently taken if, at the time of the initiation of the project, it was reasonably probable that such other property was included within the project. This principle was recognized at least as early as 1893 in *Shoemaker v. United States*, 147 U. S. 282.

Viewing Section 902(a) in the light of the well established judicial concepts, it appears to respondent that the congressional directive that values shall not be enhanced "by the causes necessitating the taking" does no more than

---

[5]These conclusions were reaffirmed three years ago in United States v. Petty Motor Co., 327 U. S. 372, 377, 378 (1946).

incorporate the principles of the *Shoemaker* and *Chandler-Dunbar* cases. Two distinct elements of enhancement are to be excluded in determining the award for a vessel requisitioned under Section 902(a): first, the enhanced value of the property due to its peculiar fitness to the taker's purposes; and, second, the enhanced value of the property, due to a project which, at the time of its initiation, it was reasonably probable would include the particular property in question. These two elements constitute excludable special value due to "the causes necessitating the taking." And these are precisely the elements which the courts would exclude in any event.

The statute, then, is no more than an affirmation of judicial standards—a statutory expression of limitations on just compensation which the courts have evolved. Nor can that meaning be dismissed as making the language superfluous. Quite the contrary appears from the context. The last sentence of Section 902(a) provides:

> "The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section."

This is clearly not an attempt to substitute legislative for judicial standards. *Sharp v. United States,* 191 U. S. 341 (1903); *Omnia Commercial Co. v. United States,* 261 U. S. 502 (1923). Like the enhancement clause, it was carried over from the provisions of the 1928 Merchant Marine Act. If it be "surplusage" to reiterate in a statute the limitations already worked out by the courts, then Congress twice indulged in surplusage in Section 902(a). Actually, we regard it as wholly reasonable that Congress, by summarizing judicial doctrine, should see fit to remind the

executive agency, and possibly even the courts, that just compensation excludes values special to the taker or created by the project necessitating the taking.

B. THE LEGISLATIVE HISTORY SUPPORTS RESPONDENT'S CONSTRUCTION OF SECTION 902(a).

The Merchant Marine Act of 1928 contained an enhancement clause applicable to the determination of "fair actual value" of *subsidized* vessels if later requisitioned by the Government. The 1936 Act contained in Section 902 an enhancement clause applicable to the determination of "fair actual value" of *all* vessels documented under the laws of the United States.[6] There is no indication whatever that Congress intended at that time, when it broadened the application of the section, to formulate a legislative measure for just compensation. Quite the contrary appears.[7]

In 1939, amendments to the 1936 statute were suggested by the Maritime Commission, one of these being to change the words "fair actual value" in Section 902 (a) to "just compensation." This amendment was made.[8] Such a

---

[6]There was an overriding ceiling for subsidized vessels in Section 802, which has no application here, since the *MacArthur* was not subsidized.

[7]Compare Senator Copeland's vigorous denunciation of what he regarded as just such an attempt in the case of the termination of the ocean mail contracts dealt with in the 1936 Act, with the strong approval of Section 902. 80 CONG. REC. 9335, 9885, 10070-10071. (1936).

[8]Section 902 of the 1936 Act contained the following language:

> ". . . the owner shall be paid the *fair actual value* of the vessel at the time of taking or paid the just compensation for the vessel's use based upon such fair actual value . . . and in no such case shall such fair actual value be enhanced by the causes necessitating the taking." (Italics added.)

change from the inexact term "fair actual value" to the judicially exact term "just compensation" is significant on its face. That it was fundamental and decisive is disclosed by the favoring report of the House Committee on Merchant Marine and Fisheries.

The House report[9] stated:

> "A rearrangement of the language referring to determination and payment of just compensation is proposed. As stated above, the words 'fair actual' have been omitted, when speaking of 'value.' The reason for the deletion is that the committee is advised that the adjectives 'fair actual' when used in connection with 'value' are indefinite and unnecessary and serve only to suggest that some other kind of value might be used in determining the just compensation guaranteed by the Constitution when private property is taken for public use. The Supreme Court has held that the determination of just compensation is a judicial function and hence the value of property taken should be determined as a matter of fact unhampered by any formula.
>
> "The proposed changes retain the legislative direction concerning the credits that shall be allowed to the United States where the just compensation is determined and paid, such as deductions for construction subsidies and for national-defense features.

In 1939 this language was amended to read as follows:

> ". . . the owner thereof shall be paid *just compensation* for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." (Italics added.)

[9] H. R. REP. No. 660, 76th Cong., 1st Sess., 4, 5 (1939). The Senate report (SEN. REP. No. 678, 76th Cong., 1st Sess., 4 (1939)) repeated verbatim the House report.

> The proposed changes also retain the injunction now carried in section 902 that the value of the property taken and used shall not be enhanced by the causes necessitating the taking and use."

The purpose of the amendment as thus explained by the committees of the House and Senate is crystal clear. The Congress desired that indemnification to an owner whose vessel was requisitioned should be based on the established judicial principles of compensation. Under these principles just compensation means "the full and perfect equivalent in money of the property taken," as reiterated in 1943 in *United States v. Miller*, 317 U. S. 369, 373. The congressional committees concluded that the phrase "fair actual value," as used in the Merchant Marine Act, 1936, was "indefinite and unnecessary and [might] serve only to suggest that some other kind of value might be used in determining the just compensation guaranteed by the Constitution when private property is taken for public use."

Notwithstanding the unequivocal manifestation of congressional intent contained in these committee reports, petitioner makes no mention of them, even to try to explain them away. Indeed, petitioner is driven far afield in an attempt to find something which it can cite as "legislative history." From a general concern, reflected in congressional studies and other investigations over a period of years from 1922 to 1948, with the question of excessive profits and earnings during World War I, and from a few random remarks which petitioner refers to as "some more specific inklings," it seeks to draw the conclusion that Congress intended by retaining the enhancement clause in 1939 to exclude some unspecified and apparently unspecifiable ele-

ments of value. It cites, for example, an oral statement by Senator Bailey that "the valuation is not to be on any enhanced value due to the emergency, but on the value prior to the emergency" (Brief, p. 99). We submit that reliance on a nebulous oral remark is scarcely warranted when there is available the carefully worded written report of the committee which Senator Bailey signed as chairman. Moreover, if petitioner would have Senator Bailey mean by the "emergency" the limited emergency proclaimed on September 8, 1939, then petitioner would have the Senator adopting a position more extreme, even than that of the Comptroller General, who now would allow some later enhancement. See pp. 12-13, *supra*.

Nor are the studies and investigations conducted at times before or after 1939 relevant in determining congressional intent. Reliance on any such data would exceed even the attempts condemned by the Court in *United States v. United Mine Workers*, 330 U. S. 258 (1947). The Chief Justice there denied that the meaning of the Norris-LaGuardia Act of 1932 could be determined from the legislative history of a 1943 statute. Utterances and opinions in 1943, it was ruled, were not (p. 281-2) "authoritative guides to the construction of the Norris-LaGuardia Act. They were expressed by Senators, . . . none of whom was on the Senate Judiciary Committee which reported the bill." Certainly the admonition is particularly applicable to an attempt to reach congressional intent in 1939 by reference to the Comptroller General's decision in November 1942, as petitioner appears to do.[10]

---

[10]It does, however, appear to be proper, under the *United Mine Workers* case, to call attention to the fact that in 1942 the Senate Commerce Committee, the membership of which was substantially

And to rely on such "inklings" as the observations of a Congressman in 1922 who was an opponent of a particular bill, and who changed his mind and become a supporter of the 1928 Merchant Marine Act, is not an appropriate method for determining congressional intent (Petitioner's Brief, pp. 96-97). The use of such methods brings to mind the pithy warning of Mr. Justice Cardozo against disregarding the apparent purpose of Congress and inquiring into hidden motives: "Thus the process of psychoanalysis has spread to unaccustomed fields." *United States v. Constantine*, 296 U. S. 287, 299 (1935); see also *Sonzinsky v. United States*, 300 U. S. 506, 513-514 (1937).

We submit that the Court may fairly put to one side petitioner's "inklings." They do not detract in the slight-

---

the same as that which passed upon the 1939 amendment, proposed a clarifying amendment to Section 902 (a) as "an affirmation of the . . . legal standards fully set forth in the numerous decisions by the Supreme Court of the United States" which the "Administrator is required to follow in determining just compensation," and "to avoid any danger that it may be construed in a manner conflicting with the fifth amendment of the Constitution." SEN. REP. No. 1813, 77th Cong., 2d Sess., 8, 9 (1942). Congress adjourned before action was taken on the omnibus bill which contained the clarifying amendment. The report just mentioned comments upon the Comptroller General's interpretation as follows:

> "Section 902(a) of the act contains language relating to enhancement of values which is ambiguous and which may be susceptible of an interpretation which might force a rolling back of prices to some earlier period, possibly even to 1939 as the Comptroller General has pointed out. It is not believed that such an extreme interpretation was intended to be applied."

Petitioner fails to mention this in connection with the argument it builds upon Senator Bailey's oral remarks quoted at page 20, *supra*, notwithstanding that the report was signed by Senator Bailey as chairman.

est from the unequivocal statements by the House and Senate committees in support of the position which respondent now takes—that Congress did *not* intend to legislate a departure from the judicial doctrines of just compensation, and that it *did* intend to make clear that those doctrines were to be applied.

C. SEVERAL RULES OF STATUTORY INTERPRETATION SUPPORT RESPONDENT'S CONSTRUCTION OF SECTION 902(a).

Not only does petitioner fail on the text and context of the statute, and on its legislative history, but it necessarily also flouts several cardinal rules of statutory interpretation which may properly be applied here.

The first, and perhaps the most important, is the rule which prefers the construction which avoids doubts as to constitutionality. "We cannot," the Court has said, "attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.'" *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 351-352 (1937). See also Ex parte *Eudo*, 323 U. S. 283, 299 (1944); *United States v. CIO*, 335 U. S. 106, 120 (1948).

Because it is important enough to receive extended treatment, which would unduly interrupt the argument here, we have devoted Point II, *infra*, to the constitutional argument. Nevertheless, we believe we are warranted here in noting, on this point, that the doctrine of *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893)—that the public must pay the full equivalent of the property taken, and that the measurements of just compensation are for judicial and not legislative determination—has been settled constitutional doctrine for over half a century. It was announced by a unanimous court, and has been reaffirmed on numerous occasions. *E.g.*,

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 (1894); *Seaboard Airline Ry. v. United States*, 261 U. S. 299 (1923); *United States v. New River Collieries Co.*, 262 U. S. 341 (1923); *B. & O. R. R. v. United States*, 298 U. S. 349 (1936); *United States v. Miller*, 317 U. S. 369 (1943).

The words of this Court in *Helvering v. Griffiths*, 318 U. S. 371, 389 (1943), are apposite:

> "We think if Congress had passed or intended to pass an Act challenging a well known constitutional decision of this Court there would appear at least one clear statement of that purpose either from its proponents or its adversaries."

No such statement appears, clear or otherwise. The inference is indeed strong that Congress did *not* intend to challenge the *Monongahela* case, and that Section 902(a) cannot properly be read as requiring the Court to meet that challenge.

The second canon of statutory construction which petitioner ignores is that a statute must be read so as to give it "the most harmonious, comprehensive meaning possible." *Clark v. Uebersee*, 332 U. S. 480, 488 (1947). This guide in construing a statute was explained in *Markham v. Cabell*, 326 U. S. 404 (1945), where it was said:

> "The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve. . . ." (409)
>
> ". . . the normal assumption is that when Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible." (411)

In essence the position of the petitioner is that the 1939 amendment to section 902(a) which replaced the indefinite term "fair actual value" with the more precise term "just compensation" for the purpose explained in the reports of the House and Senate Committees, is to be emasculated because the enhancement clause was nevertheless retained. This conclusion would nullify the expressed intent behind the 1939 amendments. Effect can be given to this intent only if the enhancement clause (like the consequential damages clause) is read as an admonition to the administering agency to follow the rules already established by the courts.

The third canon of statutory construction which lends strong support to the respondent's construction of the statute is best stated in *United States v. American Trucking Associations*, 310 U. S. 534, 549 (1940):

> "The Commission and the Wage and Hour Division, as we have said, have both interpreted § 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."

See also *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1940); *Roland Electrical Co. v. Walling*, 326 U. S. 657, 676 (1946).

Both of the factors which the Court found persuasive in the *Trucking Association* case are present here. The Maritime Commission, the agency charged with the administration of the Merchant Marine Act of 1936, was the motivating force behind the 1939 amendments. And its contemporaneous construction of the section as amended was flatly contrary to petitioner's position, and in full accord with the decision of the court below. The importance of these facts warrants a statement of them in detail.

Chairman Land of the Maritime Commission, writing formally to Chairman Bland of the House Committee on Merchant Marine and Fisheries on March 10, 1939, suggested the proposed amendment and explained its purposes in the following language:

> "The provisions of section 902 as to the determination and payment of just compensation seem to require some clarification and the constitutional rights of private owners whose property may be requisitioned should be protected and defined. For example, section 902(a) provides that 'the owner shall be paid the fair actual value of the vessel at the time of taking or paid the just compensation for the vessel's use based upon such fair actual value.'. The Commission is advised that the Supreme Court has held that the definition and determination of what constitutes just compensation for private property taken and used for public purposes is a judicial and not a legislative question and hence, in harmony with decisions of the Supreme Court, the following language would be more appropriate:
>
> " 'When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property.' " *Hearings before House Com-*

mittee on Merchant Marine and Fisheries on H.R. 4983, 76th Cong., 1st Sess., 5 (1939).

The Maritime Commission and later the War Shipping Administration, as the agency charged with administering section 902(a), followed the construction of the enhancement clause as explained in Chairman Land's letter to Representative Bland from the date of the enactment of the 1939 amendment until the latter part of 1942. This is expressly stated in the notice issued by the WSA to the owners of all vessels purchased, chartered or requisitioned for use or title by the WSA dated December 17, 1942,[11] which reads in part:

> "In view of recent developments with respect to the interpretation of section 902 of the Merchant Marine Act, 1936, as amended, we find it necessary to advise you of the following:
>
> "During the latter part of this year, the Administrator learned for the first time that certain of the officials of the Office of the Comptroller General of the United States were of the opinion that under section 902 of the Merchant Marine Act, 1936, as amended, it was unlawful for the Administrator to pay for vessels requisitioned under section 902 of the act sums in excess of the values of these vessels as of the date of the President's proclamation of limited emergency dated September 8, 1939. Section 902 had been administered by the War Shipping Administrator and prior thereto by the United States Maritime Commission, in a manner that was inconsistent with such interpretation.
>
> * * *

[11] This notice is reproduced in full in Appendix A.

"The Administrator promptly transmitted copies of the Comptroller General's opinion to the chairman of the Senate Committee on Commerce and the chairman of the House Merchant Marine and Fisheries Committee. There was at that time pending in the Senate Committee on Commerce legislation affecting the War Shipping Administration known as the omnibus bill and designated H.R. 7424. After considering the Comptroller's ruling, the Senate Committee on Commerce on December 4, 1942, reported out H.R. 7324 with an amendment to section 902 which would *have the effect of eliminating the enhancement clause contained in the existing provision of law, thus confirming the Administrator's application of the law.* The reason for this action was explained in a report submitted on behalf of the committee (No. 1813, 77th Cong., 2d sess.), pertinent excerpts of which are attached herewith."[12]

Thus the Maritime Commission and the WSA from 1939 until November 28, 1942, in administering section 902(a), construed the enhancement clause as adding no new rules to those established by the courts in determining just compensation. A different construction was placed upon this section for the first time late in 1942, not by the agency in charge of administering the measure but by the Comptroller General. When the WSA found itself unable to persuade the Comptroller General as to the correctness of its interpretation of Section 902, the WSA then recom-

[12]Italics added. The adjournment of Congress prevented final action on this bill. Thereafter the several attempts recited above (pp. 10-12) to resolve the intra-government controversy appear to have led Congress to withhold action. Under the circumstances —with an active controversy raging among the administrative agencies, and with no judicial decisions on the point—congressional silence is without significance. *Cf.* Girouard v. United States, 328 U. S. 61, 69 (1946).

mended, as the notice specifically stated, "an amendment to section 902 which would have the effect of eliminating the enhancement clause contained in the existing provision of law, *thus confirming the Administrator's application of the law.*" (Italics added)

It is true, as petitioner's brief points out in the note on pages 33 and 34, that Chairman Land went further in his oral testimony before the committee and did mention the enhancement clause. After restating substantially the language quoted above from his letter, he added:

> "It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts." *Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 4983*, 76th Cong., 1st Sess., 10 (1939).

Petitioner's brief quotes this passage but not the significant paragraphs which precede it. The whole quotation is as follows:

> "Page 3, lines 15 to 25: A rearrangement of the language referring to determination and payment of just compensation is proposed. Some of the wording deleted in lines 16 to 22 has been transferred to subsection (b) on page 4. The phrase 'fair actual value of the vessel' has been omitted in the proposed amendments. The reason for the omission is that the Commission's legal staff has advised that the adjectives 'fair actual' when used in connection with 'value' are indefinite and unnecessary and serve only to suggest that some other kind of value might be used in determining the just compensation guar-

anteed by the Constitution when private property is taken for public use. *Our lawyers say that the determination of just compensation is a judicial function and hence the value of property taken should be determined as a matter of fact, unhampered by any formula.*

"However, the proposed amendments retain the legislative direction concerning the credits that shall be allowed to the United States when the just compensation is determined and paid, such as deductions for construction subsidies and for national defense features. Also, the amendments retain the injunction now carried in section 902 that the value of the property taken and used shall not be deemed enhanced by the causes necessitating the taking and use. It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts." *Ibid.* (Italics added)

Not only does petitioner separate the statement by Admiral Land from its context, but it also fails to note that the statement was expressly disregarded by the congressional committees. The reports which we have already quoted (pp. 18, 19, *supra*) paraphrase the language of Admiral Land's oral testimony up to the very last sentence—the sentence petitioner quotes—and then *exclude* that sentence. Certainly this is a fair indication that the sentence was not regarded as important. More than that, it no doubt indicates the awareness of the House committee that the enhancement clause was no more than a restatement of the settled judicial concepts applicable to just compensation.

With that awareness, there was no occasion to speculate on the effect of the enhancement clause on the courts; it was an admonition to the administrative body to follow recognized judicial concepts, just like the similar admonition contained in the consequential damage clause.

D. PETITIONER'S CONSTRUCTION OF SECTION 902(a) IS OPEN TO SEVERAL SERIOUS OBJECTIONS.

1. CONGRESS COULD SCARCELY HAVE INTENDED ANY OF THE VAGUE AND ARBITRARY INTERPRETATIONS WHICH PETITIONER BRINGS FORWARD.

Petitioner's brief sets forth two views as to what it suggests that Congress intended. One is the view of the Comptroller General, as it has been evolved since his first opinion in 1942. The other seems to be petitioner's own interpretation of the views of the War Shipping Administration as of 1945. (Petitioner's Brief, pp. 90, *et seq.*). Under the Comptroller General's view, from the award rendered by the Court of Claims as just compensation for the *MacArthur*, petitioner states, "the entire enhancement of $5,000 would clearly be deducted, possibly less some sum" (Petitioner's Brief, p. 125). Under petitioner's interpretation of the War Shipping Administration's eventual view, petitioner states that an "undetermined, but certainly substantial, portion of the $5,000 lump of enhancement should be eliminated" (Petitioner's Brief, pp. 125-126).

Petitioner does not choose between these conflicting interpretations or commit itself as to which better represents petitioner's own view as to the intent of the Congress. Let us examine more closely, however, the divergent views petitioner advocates and their application to the instant case.

The position of the War Shipping Administration as set forth by the petitioner, is not the position which that

agency maintained in its notice to the owners of vessels dated December 17, 1942,[13] nor the position maintained by the Maritime Commission in 1939 when Chairman Land requested Congress to amend Section 902 and his request was adopted by Congress.[14] The interpretation attributed by petitioner to the War Shipping Administration is petitioner's constructions of the rules originally promulgated by the Advisory Board on Just Compensation in December, 1943, and elaborated in October, 1945.

The construction of the enhancement clause thus referred to by petitioner as the War Shipping Administration's position, is based on Rule 4 of the first report of the Advisory Board. This rule was elaborated and clarified two years later by the Board as reconstituted by Executive Orders 9611 and 9627, dated September 10, 1945, and September 24, 1945, respectively. 10 FED. REG. 11637 (1945); 10 FED. REG. 12113 (1945).

The pertinent part of Rule 4 as originally promulgated reads:

> "From the value at the time of taking, there should be deducted any enhancement due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occur-

---

[13]The notice of December 17, 1942 is quoted in Appendix B.

[14]Admiral Land's letter to Chairman Bland of the House Committee on Merchant Marine and Fisheries, dated March 10, 1939, is quoted in full in Appendix A.

ring, should not be deducted . . ." (Petitioner's Brief, p. 139)

The War Shipping Administration, after attempting to apply this rule to actual cases over a period of slightly less than two years, decided that clarification was necessary and the Board was reconstituted. The Supplement to Rule 4 issued on October 26, 1945, by the Board follows:

> "The provision in Rule 4 that 'Enhancement due to a general rise in prices or earnings, whenever occurring, shall not be deducted' shall be taken to include a general rise in prices and earnings of merchant vessels, not due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, which is reasonably probable." (Supplementary Rule 6; Petitioner's Brief, pp. 148-149)

Under Rule 4, as thus supplemented, enhancement due to a general rise in the prices and earnings of vessels is not to be excluded. The excludable elements are: appreciations due to a prospective taking reasonably probable, appreciations due to the taking of vessels of similar type and appreciations due to the Government's need for vessels which has necessitated the taking.

According to petitioner, in applying this rule to ocean-going vessels, the War Shipping Administration has excluded increases in value of ships—but only those which commenced during and after the first quarter of 1941 when the Lend-Lease Act[15] was under consideration. (Petitioner's Brief, p. 108) While no similar formula has been

---

[15]Act of March 11, 1941; 55 STAT. 31.

applied to non-ocean-going vessels, according to petitioner, the record in this case does not show that increases in values of tugs had different causes occurring at different times than increases in values of ocean-going vessels. Hence it would seem that under petitioner's view of the War Shipping Administration's position there should be excluded from the value of the *MacArthur* only increases which occurred during and after the first quarter of 1941 and then only those which are the result of the Government's need of vessels which necessitated *the* taking, the previous taking of vessels of similar type and to a prospective taking reasonably probable.

The Comptroller General's view, as originally announced on November 28, 1942, is that "values in excess of values existing on September 8, 1939" are to be excluded "provided such excess be determined as due to economic conditions directly caused by the national emergency." Relying on an informal inter-office memorandum of November 3, 1948[16] written in the office of the Comptroller General, petitioner states that the Comptroller General would now permit an increase over September, 1939, ship values ranging from 5% for 1940 to 33⅓% for 1944. The Comptroller, it appears, considers this difference to represent enhancement not directly caused by economic conditions resulting from the emergency. (See Petitioner's Brief, pp. 112, 113.) However, such a rule of thumb is not utilized by the Comptroller General with respect to smaller vessels under 1,000 tons, according to petitioner. (See Petitioner's Brief, p. 113.) With respect to such smaller ships, petitioner says the Comptroller General has accepted the War Shipping

[16]Certiorari was granted in this case on October 11, 1948, three weeks before the date of this memorandum.

Administration's determinations on the basis of certification that the "awards did not exceed those payable under the Comptroller's decisions." (Petitioner's Brief, p. 113.) No justification is given for applying this rule of thumb to some vessels and not others. Nor is any explanation given as to the legislative justification for such a dichotomy.

We suggest that the confusion and inconsistency evident in the constructions which the petitioner urges are significant indications that Congress, when it enacted and amended Section 902(a), intended no more than the declaration of settled judicial concepts of just compensation. When one departs from them, one enters a jungle of ideas, opinions and rules of thumb where guideposts are almost wholly lacking. It is inconceivable to respondent that Congress should have intended to require such a result. Yet petitioner's position apparently leads to the conclusion that such was the congressional intent.

2. PETITIONER'S INTERPRETATIONS WOULD PRODUCE UNFAIR AND UNREASONABLE RESULTS.

The most serious defect of petitioner's interpretations is the unreasonable and unfair results they produce when applied to particular cases. Any payment of less than fair value at the time of taking for the tools by which persons earn their living is in effect a capital levy. It is not reasonable or fair that the owners of certain property should be required to make capital contributions while others similarly situated are not. Furthermore, petitioner's interpretations involve the use of pre-determined formulae. No formula can be drawn in advance that will fit equally well the infinite varieties of circumstance of the actual cases.[17] Only a

[17]The Court of Appeals, Second Circuit, recently re-expressed this principle as follows: "Just as one ship differs from another

court, with all the pertinent facts before it, can achieve the constitutional objective of putting the owner in as good a position pecuniarily as though his property had not been taken.

Requisitioning is in its nature arbitrary. Where choice exists in determining which property should be taken, favoritism is always possible. This being so, it is of importance that the person selected to lose his property should be made whole through the application of all the wisdom the judicial process is designed to assure. The process ceases to be judicial if the courts are fettered with pre-conceived legislative or administrative formulae.

Factual examples illustrate how unreasonable and unfair are the results that would follow the application of petitioner's interpretations in the manner petitioner advocates.

Petitioner contends that because the *MacArthur* was requisitioned under Section 902, this Court is obliged to direct an award of one-third less than the amount which respondent could have received on the day of taking by sale in the open market. Petitioner's interpretations require this result, notwithstanding that respondent would be entitled to recover the $15,500 fair value awarded below

(a) if the *MacArthur* had been requisitioned under the General Requisition Act of 1941;[18]

---

in kind, condition and availability for use, so there will be variables which prevent the application of any rule of thumb. Each valuation that is contested will have to be reviewed on the merits of the particular case." The Petar (Ozanic v. United States), 165 F. 2d 738, 743 (1948).

[18] 55 STAT. 742. "It should also be noted that many ships have been purchased or chartered directly by the Army or Navy or other Government agencies operating under statutes which do not contain the 'enhancement clause.' Ships have also been pur-

(b) if the *MacArthur* had been sunk through the negligence of a United States destroyer;[19] or

(c) if the *MacArthur* had carried war risk insurance at her market value, and had been taken by the enemy.

Five thousand dollars or a substantial part thereof would be disallowed under the interpretations preferred by petitioner, even though respondent had bought the *MacArthur* the day before her requisitioning under Section 902 and had paid the seller the $15,500 the court found she was worth.[20]

---

chased and chartered by the Maritime Commission under Public, 101, Seventy-seventh Congress, which contains no enhancement clause. If the enhancement clause is considered as forcing a return of prices to 1939 levels on requisitions by the War Shipping Administration, then the shipowners dealing with the Army or Navy under other laws would be favored as against shipowners whose vessels are requisitioned by the War Shipping Administration. It would appear doubtful that courts would rule that Congress intended that such a discriminatory result should follow from the enhancement clause." "Practical Aspects of the Application of the Requisition Authority," prepared by the staff of the War Shipping Administration, January 1943. Document 20, pp. 191, 206.

[19]The Petar, 68 F. Supp. 296 (S. D. N. Y. 1946), *aff'd sub nom.* Ozanic v. United States, 165 F. 2d 738 (C. C. A. 2d 1948); Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U. S. 146 (1925).

[20]The Comptroller General reached this result in a ruling dated May 17, 1943. He recognized that such a result created hardship but held that his interpretation of Section 902 left no choice. (Document 20, p. 186) Had the purchase been from the United States, even the Comptroller General could not, we believe, countenance the payment of less than the United States had received, assuming the market remained constant.

The Comptroller General's modified interpretation, as set forth by petitioner, continues the incongruities illustrated above and compounds a new one. This modified interpretation allows

"Most of the small vessels were requisitioned for title, whereas most of the larger vessels constituting the ocean-going fleet were requisitioned only for use." (Document 20A, p. 1) Most of the foreign-owned vessels also were taken for title though some were purchased at market value. (*ibid.*)

Section 902(a) requires that a vessel taken for use must "be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition." Yet the interpretations preferred by petitioner would compensate those who lost their ships and had to replace them with less than the cost of substituting a like ship.[21] In deciding whether a ship should be taken for title or for use the War Shipping Administration, under petitioner's view, was entitled to bind the courts as to which owners should contribute a disproportionate share for the common good.

---

an increase over 1939 values for vessels taken in 1941 of 14.1%, 1942 of 22.9% and 1943 of 29.9%. These were based on an index of ship building costs (Petitioner's Brief, p. 112, note; Appendix F), but petitioner concedes that the market for old vessels did not follow this index. Prices of old ships were higher in 1941 than in 1942, or later. (Petitioner's Brief, pp. 106, 107 and notes). It would compensate less for an old vessel taken in 1941 when prices were high than in 1943 when petitioner says they were low. The disparity in result is even more marked when one takes into account that the owner of the vessel taken in 1943 would have enjoyed an additional two years' use of his ship.

[21]The Act of which Section 902 is a part had as one of its purposes the fostering of a healthy "merchant marine . . . owned and operated under the United States flag by citizens of the United States. . . ." MERCHANT MARINE ACT OF 1936 § 101, 49 STAT. 1985, 46 U. S. C. § 1101 (1936). It is unreasonable to assume, as petitioner's interpretations and argument do, that the Congress that sought to encourage ship ownership intended to prevent a measure of compensation for ships below that recognized for all other kinds of property.

To contend that Section 902(a) requires the courts to reach results so unreasonable as the foregoing is to ascribe to the Congress an intent to be unfairly discriminatory and capricious.

We submit, therefore, that on its text and context, on its legislative history, on well-settled rules of statutory construction, and on the practical deficiencies of petitioner's constructions, Section 902(a) was properly construed by the court below, and that the judgment should be affirmed on that ground.

II

PETITIONER'S CONSTRUCTION OF SECTION 902(a) RAISES SERIOUS DOUBTS AS TO ITS VALIDITY UNDER THE FIFTH AMENDMENT.

We have adverted, in Point I, to the fact that one compelling objection to petitioner's interpretations of Section 902(a) is that they raise a serious constitutional question, which respondent's construction avoids entirely. We believe the constitutional issues warrant separate and extended treatment. Indeed, though it is not necessary so to hold in this case, we believe the following discussion will demonstrate that the petitioner's interpretations are quite plainly unconstitutional under the Fifth Amendment.

Respondent recognizes that Congress has authority to stabilize prices, to restrict profits, and to institute similar essential financial and economic controls during emergency wartime periods: *United States v. Bethlehem Steel Corp.*, 315 U. S. 289 (1942); *Lichter v. United States*, 334 U. S. 742 (1948); *Bowles v. Willingham*, 321 U. S. 503 (1944).

Respondent does maintain, however, that when private property is taken, whether in the exercise of the war power

or any other power, just compensation must be paid as guaranteed by the Fifth Amendment. The just compensation clause "prevents the public from loading upon one individual more than his just share of the burdens of government. . . ." *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893); see also *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555 (1935); *United States v. Miller*, 317 U. S. 369 (1943); *Olson v. United States*, 292 U. S. 246 (1934).

And the guarantees of the Fifth Amendment are not eliminated by the war power or any other power. Ex parte *Endo*, 323 U. S. 283 (1944).

Let us take a simple illustration of the petitioner's contention. Sister ships are owned by two separate persons. At a given date one of the owners sells his vessel on the open market and on the same date the other vessel is requisitioned by the Government. The first owner would receive the market value of his vessel; the second owner would receive appreciably less than market value, assuming values to have increased appreciably from the date when they were fixed for requisitioning purposes.

In view of the recent pronouncements of this Court, no one can doubt the gravity of the constitutional issue which that illustration presents. In *Bowles v. Willingham*, 321 U. S. 503, 517 (1944), the Court in sustaining the constitutionality of the Emergency Price Control Act of 1942 was careful to observe:

> "We are not dealing here with a situation which involves a 'taking' of property. *Wilson* v. *Brown*, *supra*. By § 4(d) of the Act, it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accom-

modations for rent.' There is no requirement that the apartments in question be used for purposes which bring them under the Act."

Similarly, in *United States v. John J. Felin & Co.*, 334 U. S. 624 (1948), Mr. Justice Frankfurter, joined by the Chief Justice and Mr. Justice Burton, said:

> "The conventional criterion for determining what is 'just compensation' for private property taken for public use is what it would bring in the free, open market. . . . In enforcing this constitutional requirement 'the question is what has the owner lost, not what has the taker gained.' *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *McGovern* v. *New York*, 229 U. S. 363. Respondent's sole claim is for the pecuniary equivalent of the property taken" (629-630).

Mr. Justice Reed, with whom Mr. Justice Black and Mr. Justice Murphy joined, said:

> "It is the market value of any product that is the basis for just compensation (643).
>
> * * * * * *
>
> "It has long been established that in a free market the market price is the proper criterion for determining 'just compensation'" (644).

Mr. Justice Jackson, with whom Mr. Justice Douglas joined, said:

> "The Fifth Amendment's 'exact limitation on the power of the government' is not market price—it is just compensation. The former is relevant, and this Court has so considered it, only because, in a free market, it is perhaps the best key to value at the time of taking" (652).

Likewise, in *United States v. Petty Motor Co.*, 327 U. S. 372 (1946), which involved the condemnation of a leasehold interest under the Second War Powers Act, 56 STAT. 176, 177, Mr. Justice Reed, speaking for the majority, stated:

> "The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings (377-378).

And in a concurring opinion Mr. Justice Rutledge observed that the rule of compensation would be different when a short or long term use of property is taken than would be the case when the owner's entire interest is taken, adding:

> "The purpose and the basis for this were to give substance, in practical effect, to the Amendment's explicit mandate for payment of '*just* compensation' in cases of such extraordinary 'takings' and to prevent those words from being whittled down by legalistic construction into means for practical confiscation" (383).

Certainly it is not to be presumed that the principle that just compensation means the value of the property "ascer-

tained as of the date of the taking,"[22] so carefully adhered to by a long line of cases,[23] would be discarded cavalierly. Hence, serious doubts would clearly exist as to the constitutionality of such an imagined statute pegging values for requisition purposes.

Moreover, nothing in *United States* ex rel. *TVA v. Powelson*, 319 U. S. 266 (1943), eliminates these doubts. Not one penny was deducted in that case from market value. The property owner there asserted that its land was worth more than the market price, contending that the owner's power of eminent domain, conferred by the state of North Carolina, would enable it to combine the land which it owned with numerous pieces of land to form a large power development. The Court pointed out that if the land in question had been condemned by North Carolina, the owner's privilege of eminent domain, which had been granted by the state, would not have been an element of value, saying:

> "The inclusion of eminent domain would be but an indirect method of making North Carolina pay for the destruction or impairment of the privilege" (277).

---

[22]United States v. Miller, 317 U. S. 369, 374, (1943). In this opinion, the just compensation guarantee of the Fifth Amendment was also explained in the following manner:

> "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (373).

[23]Boom Co. v. Patterson, 98 U. S. 403 (1879); Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893); Bauman v. Ross, 167 U. S. 548 (1897); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913); Seaboard Air-Line Ry. v. United States, 261 U. S. 299 (1923); United States v. New River Collieries Co., 262 U. S. 341 (1923); Olson v. United States, 292 U. S. 246 (1934); United States v. Miller, 317 U. S. 369 (1943).

And later the Court added:

> "No precedent has been advanced which suggests that a *different* measure of compensation should be required where the United States rather than the state is the taker of the property for a public project. Nor has any reason been suggested why as a matter of principle or policy there should be a *different* measure of compensation in such a case" (278).

Nor are these doubts dissipated by adverting to decisions of this Court reviewing state condemnation proceedings. (Petitioner's Brief, p. 55, note 37, and p. 56.) Petitioner's view of these cases is that the right to just compensation under the Fifth Amendment is satisfied unless a statute prevents the property owner "from obtaining substantially any compensation," quoting from *Chicago, B. & Q. R.R. v. Chicago*, 166 U. S. 226, 247 (1897).

The cases relied on by petitioner to support this suggestion, however, do not do so. All of these cases involve appeals to this Court from state court condemnation proceedings. In *every* case the applicable state statute or constitutional provision provided for the payment of "just compensation" or its equivalent. The complaint of the appellant in each case was based on some alleged defect in the court proceedings which had deprived him of due process of law.

In *Chicago, B. & Q. R.R. v. Chicago, supra*, for example, the Court used the words quoted in part by petitioner. Discussing the extent of the review permitted to this Court, Mr. Justice Harlan said (at 246):

> "We are permitted only to inquire whether the trial court prescribed any *rule of law* for the guid-

ance of the jury that was in absolute disregard of the company's right to just compensation.

"We say, 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here . . . Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted." (Italics added.)

If this Court had undertaken to review the award in the *Chicago* case in the manner advocated by the appellant it would have to review every state condemnation case in which a property owner was awarded less than he thought he should receive. The essence of the Chicago decision is entirely sound and it is this: Granted a statutory or state constitutional framework which provides just compensation to property owners who suffer requisition by the state, the Court will not—and cannot—inquire into every detail of a judicial proceeding carried through by an established court acting within the legislative or constitutional framework. As Mr. Justice Holmes said in *McGovern v. New York*, 229 U. S. 363, 370 (1913), this Court cannot interfere in the way a state court applies its own statutes unless there appears "something more than an ordinary honest mistake of law."[24]

---

[24]Mr. Justice Cardozo, speaking for the Court in Roberts v. New York City, 295 U. S. 264, 277 (1935), said: "The Fourteenth Amendment is not a guaranty that a trial shall be devoid of error."

Nor are the constitutional doubts of an imagined congressional enactment pegging value for requisition purposes dissipated by reference to decisions of courts in foreign countries (Petitioner's Brief, pp. 47-48, 61-64, 71, *et seq.*). In most of these countries there is no constitutional guaranty similar to that provided in the Fifth Amendment to the United States Constitution. Thus, the British, French, Canadian and New Zealand material is not relevant.[25]

Petitioner's use of certain Australian cases that purportedly buttress its position merits comment in order to avoid any misunderstanding as to the principles enunciated therein.

At pages 47-48 of its brief petitioner cites *Minister of State for the Army v. Dalziel*, 68 C.L.R. 261 (1944), as having "established" the "law of Australia" which permits Parliament to fix reasonable "acquisition terms" that are binding on the courts. The implication is that the High

---

[25]The plain language of the British compensation statute contradicts petitioner's statement of its meaning. It is true that monthly payments of compensation in the form of charter hire, under paragraph (a) of Section 4(1) of the British statute, are to be fixed without regard to any appreciation in the value of such charters due to the emergency; but petitioner neglects to inform this Court that the proviso in regard to appreciated values does *not* apply to paragraph (d) of the same subsection. This paragraph gives the owner of requisitioned property that has become a total loss its "value" *at the time of loss* with no deduction or exclusion for "appreciation" or "enhancement" due to the emergency, the war, or any other cause. The owner of a ship requisitioned by the British Government and then lost would receive (1) charter hire for the period during which the Government sailed the vessel before the loss; *and* (2) the full value of the vessel at the time of the loss; *and* (3) under paragraph (e), expenses reasonably incurred in complying with Government directives concerning the requisition—what is clearly a "consequential" damage under American law. Contrast these advantages of the British shipowner with the position of the American shipowner should petitioner's contention be adopted by this Court.

Court of Australia would uphold petitioner's construction of the enhancement clause as "just."

Such an implication is unjustified. The High Court in the *Dalziel* case actually *invalidated as unjust* a regulation and subsidiary order which prescribed the measure of compensation for a taking. Petitioner neglects to mention this vital fact, however, until it comes to footnote 53 at pages 72 and 73 of its brief. Petitioner's text at pages 62 and 63 quotes two passages from one of the *dissenting* opinions in the *Dalziel* case without mentioning that fact.[26]

The order which was invalidated in the *Dalziel* case was one providing that in awarding compensation for wartime requisitions no account should be taken of lost profits. In striking down this provision Justice Rich said (at 287):

> "It is by the Constitution itself that the acquisition is required to be on just terms; and, since Parliament is bound by the Constitution, by no artifice or device can it withdraw from the determination by a court of justice the question whether any terms which it has provided are just, that is, terms which secure adequate compensation to those who have been expropriated."

There is no difference in principle between this restriction invalidated in the *Dalziel* case as "unjust" and the enhancement clause as it is construed by petitioner in this case.[27]

---

[26]Footnote 42 on page 62 of Petitioner's Brief also quotes a passage from the dissenting opinion of Starke, J.

[27]The so-called "enhancement clause" which was contained in the Australian compensation order was not in issue in the *Dalziel* case, but was invalidated in *Minister of State for the Army v. Pacific Hotel Proprietary Ltd.*, unreported but noted in 68 C. L. R. 310. It is impossible to tell from the note on what basis the court relied in invalidating the clause.

The *Grace Brothers* case,[28] also relied on by petitioner, is simply a variant of *United States v. Miller, supra,* as Justice Starke, (at page 286) pointed out, at the same time remarking that any statute which attempted to set a valuation date which was not "about" the time of the taking would not be "just" and would, therefore, be unconstitutional.[29]

If petitioner had sought to discover the Australian law as it related to just compensation for requisitioned ships, it should have studied the case of *Minister of State for the Navy v. Rae,* 70 C.L.R. 339 (1945). This case, decided by Justice Dixon, involved review by the High Court of compensation awarded for the requisition of a vessel taken by the Government in November 1943. The High Court said (at 344):

> "If there is a market for a ship that is the most satisfactory test of its value . . ."

The court found, however, that there was no market for vessels of the kind in question at the time of the taking. It therefore expressed the following method of arriving at a proper compensatory value:

> ". . . I think it is wise to use such scanty evidence as is contained in the transcript to attempt to con-

---

[28]Grace Brothers Proprietary Ltd. v. Commonwealth, 72 C. L. R. 269 (1946).

[29]In the same case Justice Dixon said:

> "In conditions of great economic instability, when the measurement of values in money fluctuated violently and rapidly, it perhaps might be that just terms would require not only valuation, but payment almost as at the date of acquisition. Further, a statute which fixed some anterior date for the ascertainment of value because values were known generally to be lower might be open to attack. Here, however, we are not confronted with any such question." (291-292)

> struct a pre-war value, and then add to that what is thought to be an appropriate percentage to *represent the increase in the cost of production and generally in the value of craft*" (347). (Italics added)

Consequently, the final decision of the court awarded compensation which included an *addition* of more than 10% of the vessel's pre-war value in order to allow for "the appreciation of values by reason of increased costs and other elements attributable to the war" (348).[30]

Moreover, one cannot ignore another consequence of petitioner's argument, with particular reference to foreign countries. If we should fail to compensate our citizens and foreigners with the full value of their property when taken for public use, we would undermine our ability to protect American owned property abroad from expropriation with inadequate compensation.[31] The War Shipping Administration had these considerations in mind when it wrote:

> "We doubt that Congress intended . . . to furnish to foreign nations a precedent under which they could, at some future time, requisition American-owned property, not upon a basis of fair value at the date of requisitioning . . ." (Document 20, pp. 205-206)

---

[30] *Cf.* Chief Justice Latham in Commonwealth v. Huon Transport Proprietary Ltd., 70 C.L.R. 293, 300. (1945): "If there were a market in which vessels of this kind could be hired in Tasmania, the market rates would be the best evidence of what it would be fair for the Commonwealth to pay" [for ships requisitioned during the war].

[31] Secretary of State Hull on April 16, 1943 wrote the War Shipping Administrator:

> "While the matter is of importance from the standpoint of the international responsibility of this Govern-

Returning to our own constitutional precedents, it will not have been overlooked that any taking of capital goods at less than their value is tantamount to a capital levy. If the exigencies of war or other national crisis in this country should ever reach such a point as to warrant a capital levy, due process will require that this be distributed fairly and not be left—as under petitioner's contentions—to arbitrary selection.

We submit, therefore, that nothing appears in the decisions of this or any other court to weaken respondent's contention that an attempt by the Congress to peg values at a specified date for purposes of determining just compensation would even in wartime give rise to serious constitutional doubts.

III

On the facts found in this case, the judgment below should be affirmed on any construction of section 902(a)

There is no doubt that, if respondent's interpretation of Section 902(a) is correct, the decision below should be affirmed. The court's findings are clear that the award of $15,500 represented the fair market value of the *MacArthur*, that it constitutes just compensation to the respondent, and that it includes no elements of enhancement which courts exclude in just compensation cases. The award does not include any elements of the special adapta-

---

ment with respect to the properties of nationals of foreign countries; it is also of importance from the point of view of the expropriation by foreign governments of extensive properties of American nationals in foreign countries, whose interests we must keep in mind." (Appendix C).

bility of the *MacArthur* to respondent's use, or of the peculiar fitness of the *MacArthur* to the petitioner's purposes (R. 12-14), nor was any part of the enhancement of value due to the prospect that she would be requisitioned (R. 13). We need not argue the point, for we do not understand that the petitioner challenges this conclusion.

The petitioner assumes, however, that if one of its readings of Section 902(a) should be adopted, the decision below should be reversed. Unless that is correct, however, it is plainly settled that the Court will not undertake to pass on any issue, much less a delicate question of constitutional law, that is presented to it in the abstract. *Liverpool, N. Y. & P. Steamship Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885); *Ashwander v. TVA*, 297 U. S. 288, 324 (1936); *Cincinnati v. Vester*, 281 U. S. 439, 448-449 (1930). We submit that petitioner is in error on the facts; that even under its construction of Section 902(a), the decision below must be affirmed.

The record here shows that the Government uninterruptedly owned and retained possession of the *MacArthur*, originally named the *Guthrie*, from the date of her launching in 1895 until her sale to respondent in March 1942 (R. 5, 6). The record further establishes the facts that the March 1942 sale to the respondent was an open market transaction with competitive bids solicited and that the ship was sold to the respondent as the highest of three bidders (R. 8).

The court below found that prior to the proclamation of May 27, 1941, the general rise in the market value of vessels was due to the demand for vessels which followed the outbreak of the war in Europe (R. 12). After that date the rise in market values was due in part to the Government's

need for vessels and in part to the great increase in shipping and harbor traffic which occurred during the period of the war (R. 12-13). As a result, the value of the *MacArthur* had been enhanced by the sum of $5,000 by October 15, 1942, the date of taking (R. 13).

Under petitioner's "preferred" reading of Section 902 (a)—the Comptroller General's view—the entire enhancement of $5,000 would be excluded. This is so unfair as to be absurd. The vessel was owned by petitioner during the entire period from its building to March 19, 1942, and increases in value up to that period were necessarily reflected in the sale price to respondent. Certainly Section 902(a) cannot mean that petitioner can sell at the enhanced value of March 1942 and six months later requisition the same vessel at the 1939 value.

Nor does petitioner fare better on its second-best reading of Section 902(a). The court below found that the fair market value of the vessel at the time of taking was $15,500 (R. 13). Petitioner admits that the vessel could have been sold on the market for this amount (Brief, p. 9, note). Certainly, presumptively at least, the market value having been established, the burden was on petitioner to show that this value was enhanced "by the causes necessitating the taking." The findings, which are not contested, show that petitioner did not, and cannot now, sustain that burden.

Even under the broadest reading of the ruling of the Advisory Board the "causes necessitating the taking" cannot be "the demand for vessels which followed the outbreak of the war in Europe," or "the great increase in shipping and harbor traffic which occurred during the period of the war." Nor can any more be said of the finding that the rise in market value of vessels was due in part "to the Govern-

ment's need for vessels, which necessitated the taking of many vessels." The court below also found that it was not possible to allocate to this cause a definite part of the increase in market value.

Petitioner attempts to avoid the dilemma which confronts it in this case by the remarkable statement (Brief p. 127) that—

> "the findings themselves indicate the likelihood that the larger part of the $5,000 enhancement from September 1939 to October 1942 accrued in the seven month period respondent held the vessel (March 19, 1942-October 15, 1942)."

This assertion does not make sense. The record is barren of any evidence that the value of the *MacArthur* was enhanced during the seven months she was owned by respondent due to any of the causes which petitioner contends are to be excluded. In fact, at another point in its brief, petitioner appears to concede this point. In discussing values for ocean-going vessels, petitioner states (p. 106):

> "Toward the end of 1941, these prices and rates began to fall and by the time the full scale requisitioning program commenced in April 1942, the market values of ocean-going vessels were lower than they had been in May 1941, but still substantially higher than the 1939 levels."

With values, as petitioner contends, on the decline from late 1941 to April 1942, it is only reasonable to assume that the decline continued, or at the least that values did not increase. Certainly nothing occurred during these seven months (either of common knowledge or contained in the record of this case) which would indicate that the decline in value was offset by a rise in values.

The *MacArthur* was a tug, not an ocean-going vessel; but to infer, as petitioner's assertion does, that the market for tugs stayed down while for other vessels it went up, then up for tugs when others came down is to challenge credulity and, more, makes a travesty of petitioner's deductions regarding the causes of the enhancement.

The actual basis for the increase in value of the *MacArthur* between March and October 1942 is, however, disclosed in the record. The purchase price paid by the respondent in March 1942 was $2,875 (R. 8). And in reconditioning the *MacArthur* respondent expended a total of $5,699.78 on labor and materials (R. 9). But it was also found that this "amount would have been substantially greater had all of the work been performed by a shipyard at the abnormally high rates being charged at that time" (R. 9). Thus the total monetary expenditure of respondent amounted to $8,574.78.

The value of the ship in October, 1942 when requisitioned in New York was $15,500 as determined by the Court of Claims. The difference between this amount and the total funds expended by respondent in the purchase and reconditioning of the *MacArthur* was certainly not due to the elements of enhancement that might be excluded by either the Comptroller General or by petitioner's construction of the War Shipping Administration position. For the court below found that the sums expended by respondent "would have been substantially greater had all the work been performed by a shipyard at the abnormally high rates being charged at that time." Moreover, as a result of the extensive repairs, new equipment, and supplies, this vessel was put in first class condition and certificated on April 20, 1942 as a "towing steam vessel" (R. 8). At no other time during

the long life of the *MacArthur*, from her launching in 1895 to April 1942, had the vessel been designated as a towing steam vessel. The record specifies that the *MacArthur* "was never used for towing other vessels except in emergencies or for rescue work" (R. 6), and the use to which, prior to April 1942, she had been put "was much lighter than that engaged in by commercial towing vessels and consisted of irregular and infrequent trips from her berth in the harbor to and from incoming vessels." (R. 6) Hence, the total funds actually expended by the respondent by no means represented the actual increase in value of the *MacArthur* which were attributable to this work. Furthermore, the sale took place in Portland, Maine, and the requisition in New York harbor (R. 8, 9, 10).

Finally, if the Government failed to attain the best price possible in selling the *MacArthur* in March, 1942 as a result of ineffective advertisement or for any other reason, the enhancement clause does not permit the Government to correct its mistakes by paying less than fair value when it requisitions the vessel.

According to petitioner's own admission, the Comptroller General maintains that it "is only fair and just that the Government should pay . . . an increment representing the actual increases and the labor and material costs involved in building ships . . . since it [the increment] may be regarded as constituting, in effect, actual out-of-pocket loss by the owner due to the taking of his property" (Petitioner's Brief, pp. 112, 113). Certainly, the increased price which respondent had to pay for repairs in reconditioning the *MacArthur* likewise constitutes "in effect, actual out-of-pocket loss by the owner."

By petitioner's own admission, its less preferred interpretation would result in no less liberal an award than would the interpretation of the Comptroller General.[32]

We submit, therefore, that neither the Comptroller General's interpretation nor petitioner's view of the War Shipping Administration's interpretation, as applied to the *MacArthur*, would result in the reduction of the award of $15,500 rendered by the Court of Claims. Even if the petitioner were to evolve some theory by which, if one of its readings of Section 902(a) were to be adopted, it could prevail on this record, the fact remains that the precise application of the several interpretations of Section 902 cannot adequately be tested in this case. It is settled that the Court will not undertake to deal with a specific constitutional issue the contours of which cannot be fixed by specific application to facts which squarely raise the issue. *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18, 22 (1936); *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 210 (1934); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 251 (1928).

---

[32]See Petitioner's Brief, pp. 125-126, where it is stated:

"On the Comptroller General's view, the entire enhancement of $5,000 would clearly be deducted, possibly less some sum for enhancement not directly caused by economic conditions resulting from the emergency. . . .

"Under the Advisory Board's Rule, an undetermined, but certainly substantial, portion of the $5,000 lump of enhancement should be eliminated."

CONCLUSION

Wherefore, it is respectfully submitted that the judgment below is correct and should be affirmed.

JOHN LORD O'BRIAN
FRANK C. MASON
Counsel for ~~Petitioner~~ Respondent

HAROLD A. KERTZ
JOHN G. LAYLIN
CHARLES A. HORSKY
DONALD HISS
Of Counsel

January 1949.

APPENDIX A

*Letter From Chairman Land Of Maritime Commission to Chairman Bland of House Committee on Merchant Marine and Fisheries.**

UNITED STATES MARITIME COMMISSION,
Washington, March 10, 1939.

Hon. S. O. BLAND,
Chairman, Committee on Merchant Marine
and Fisheries, House of Representatives,
Washington, D. C.

MY DEAR MR. CHAIRMAN: As stated in my letter to you dated February 27, 1939, setting forth the Commission's views and recommendations on H. R. 131, a bill to amend sections 712 and 902 (a) of the Merchant Marine Act, 1936, as amended, relative to the requisitioning of vessels, the Commission has been making a study of the procedure and substantive problems which may arise if it is found necessary to exercise the emergency powers vested in the Commission by the provisions of section 902 of the Merchant Marine Act, 1936, as amended.

As a result of discussions between representatives of the Commission and of the Navy Department concerning the formulation of plans for the speedy and effective use of privately owned merchant vessels and other watercraft during a period of emergency proclaimed by the President, the Commission is persuaded that the authority vested in the Commission under section 902 should be enlarged and expanded, and the rights of private owners should be clarified and protected, as follows:

The authority to acquire vessels in an emergency is now limited to requisitioning those "documents under the laws of the United States." It may be desirable to acquire vessels

*Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4983, 76th Cong., 1st Sess., 5 (1939).

owned by citizens of the United States and operated under foreign registry or to acquire small watercraft which are not registered, licensed, or enrolled under the laws of the United States, or to acquire vessels which are under construction in American yards.

In some cases, perhaps, the interests of the Government would be best served if the necessary vessels and other watercraft were acquired by purchase or the use thereof were obtained through charters rather than through requisition.

Because of the foregoing considerations, it is suggested that section 902 be amended so that it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft constructed or under construction, or, for any period during the emergency, to requisition or charter the use of any such property.

Cases may arise where it will be preferable to requisition merely the use of a vessel and permit the owner to operate under a requisition charter for the account of the United States. Such authority as to vessels was granted to the President in section 11 of the act of July 18, 1918 (40 Stat. L. 913), which also provided in effect that the terms of the charter proposed to the owner should constitute a determination of just compensation. If the owner was unwilling to accept the charter, he could take 75 percent of the charter hire tendered and sue for such further sum as would amount to just compensation for the use of the vessel. It is suggested that provision be also made for compensation to the owner for the loss or damage to a vessel when its use had been requisitioned, but no agreement had been reached as to its value or as to compensation for its loss or damage. It is recommended that section 902 be expanded by inclusion of similar provisions with respect to the requisition by the Commission of the use of vessels and other watercraft.

As section 902 now stands, there is no provision for a declaration that the period of the emergency has ended. Consequently the Commission might continue to exercise

emergency powers for a long time after the necessity therefor had terminated. To correct this apparent oversight it is recommended that the following provision be added:

"The termination of any emergency so declared shall be announced by a further proclamation by the President."

The provisions of section 902 as to the determination and payment of just compensation seem to require some clarification and the constitutional rights of private owners whose property may be requisitioned should be protected and defined. For example, section 902 (a) provides that "the owner shall be paid the fair actual value of the vessel at the time of taking or paid the just compensation for the vessel's use based upon such fair actual value." The Commission is advised that the Supreme Court has held that the definition and determination of what constitutes just compensation for private property taken and used for public purposes is a judicial and not a legislative question and hence, in harmony with decisions of the Supreme Court, the following language would be more appropriate:

"When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property."

Section 902 now contains no provision for a partial payment on account of just compensation to an owner who is unwilling to accept the amount awarded by the Commission and elects to sue the United States. The Emergency Shipping fund provisions of the act of June 15, 1917 (40 Stat. L. 182), which authorized the President to requisition vessels, provided that when the amount of just compensation awarded by the President, "is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor."

It is suggested that in instances it may work an undue hardship to take private property for public purposes and

to require the owner to wait for all of his compensation therefor until his rights are determined by the courts, in any case where he is unwilling to accept the award made by the Commission. Accordingly, it is recommended that a provision similar to the one contained in the earlier emergency legislation (but now repealed) be incorporated in section 902.

It is further recommended that authority be given to the Commission to repair, recondition, reconstruct, and operate, and to charter for operation, any property acquired under authority of section 902. Also, to carry out plans being worked out with the Navy Department, authority should be granted to the Commission to transfer possession and control of any property acquired under authority of section 902, to any department or agency of the Government, under such terms and conditions as may be approved by the President, and to provide for prompt reimbursement by such department or agency for any expenditures made by the Commission on account of the vessels or watercraft so transferred.

If the suggestions and recommendations herein set forth meet with favorable consideration, their inclusion in section 902 may require a complete redrafting and rearrangement of the language now employed in that section.

The foregoing suggestions and recommendations should be considered in connection with the provisions of H. R. 131 now before your committee and as an amplification of the views and recommendations on that bill previously submitted in my letter to you dated February 27, 1939. A draft of a bill which would carry out these suggestions is enclosed.

This report, together with copy of the letter dated March 9, 1939, from the Acting Secretary of the Navy concurring in the proposed report and draft of amendment attached thereto, has been submitted to the Acting Director, Bureau of the Budget, and the Commission is advised by him that there would be no objection to the submission of the report to your committee.

Very sincerely yours,

(Signed) E. S. LAND, *Chairman.*

APPENDIX B

*Notice From War Shipping Administration to Owners of Requisitioned Vessels Suspending Payments of Previously Determined Values and Setting Up Alternative Method of Payment on Basis of November 28 Ruling to Alleviate Hardships.**

WAR SHIPPING ADMINISTRATION,
Washington, December 17, 1942.

To the Owners of All Vessels Purchased, Chartered, or Requisitioned for Use or Title by the War Shipping Administration:

In view of recent developments with respect to the interpretation of section 902 of the Merchant Marine Act, 1936, as amended, we find it necessary to advise you of the following:

During the latter part of this year, the Administrator learned for the first time that certain of the officials of the Office of the Comptroller General of the United States were of the opinion that under section 902 of the Merchant Marine Act, 1936, as amended, it was unlawful for the Administrator to pay for vessels requisitioned under section 902 of the act sums in excess of the values of these vessels as of the date of the President's proclamation of limited emergency dated September 8, 1939. Section 902 had been administered by the War Shipping Administrator and prior thereto by the United States Maritime Commission, in a manner that was inconsistent with such interpretation.

As soon as the views of the subordinate officials of the Comptroller General were made known to the Administrator, conferences were held with the Comptroller General, but no solution to the problem developed therefrom. The

*Document 20, pp. 129-133.

Comptroller General then offered to state his views upon receipt of a formal request for an opinion which could be transmitted to Congress for such action as it deemed appropriate. Accordingly, the Administrator directed a request to the Comptroller General of the United States for formal opinion under date of November 24, 1942, on 15 specific questions, and on November 28, the Comptroller General replied on all points. A copy of his opinion is attached herewith.[1]

You will note that, in the opinion of the Comptroller General, values of all vessels, including both large and small craft—freighters, passenger ships, tugs, barges, fishing vessels, and other watercraft—were, in effect, frozen by the President's proclamation of limited emergency on September 8, 1939, except for vessels built or rebuilt after that date, as to which the Comptroller apparently would allow payment of actual cost less depreciation, and that, in his opinion, the Administrator may not lawfully pay for use or title to vessels at higher rates or values than those prevailing on September 8, 1939. It will be noted that the 1939 values apply notwithstanding the fact that the vessels were purchased after that date at substantially higher cost and even though replacement vessels cannot now be obtained at 1939 prices. Charter rates also would be reduced under this ruling to September 8, 1939, levels, except for additional allowances for increases in expenses since that time.

Immediately upon receipt of this opinion, the Administrator ordered that payments for vessels purchased or requisitioned for the War Shipping Administration under section 902 of the Merchant Marine Act, 1936, as amended, be discontinued. Payments for vessels lost from marine or war casualties under charters made under this section were also stopped pending a clarification of the situation.

The Administrator promptly transmitted copies of the Comptroller General's opinion to the chairman of the Senate

---

[1] Attachment omitted.

Committee on Commerce and the chairman of the House Merchant Marine and Fisheries Committee. There was at that time pending in the Senate Committee on Commerce legislation affecting the War Shipping Administration known as the omnibus bill and designated H. R. 7424. After considering the Comptroller's ruling, the Senate Committee on Commerce on December 4, 1942, reported out H. R. 7324 with *an amendment to section 902 which would have the effect of eliminating the enhancement clause contained in the existing provision of law, thus confirming the Administrator's application of the law* [italics added]. The reason for this action was explained in a report submitted on behalf of the committee (No. 1813, 77th Cong., 2d Sess.), pertinent excerpts of which are attached herewith.[1]

However, although the bill was placed on the Senate Calendar, it did not come to a vote prior to adjournment of this Congress, leaving the entire question open for the next Congress—see Congressional Record of December 15, 1942.

During the interim, unless the Administrator applies the statute in accordance with the Comptroller General's ruling, he will be in a position of administering the law in a manner inconsistent with the interpretation of the Government's accounting officers. Under the circumstances, the Administrator feels that it is incumbent upon him, in view of the large sums of money involved in this problem and the public interest relating thereto, to apply the Comptroller General's ruling and accordingly to take the following action:

* * *

It is hoped that the action of the Administrator as above outlined will not cause undue hardship or inconvenience to the owners and operators of vessels. The Administrator is most anxious that the problem of valuation should not impede the prosecution of the war and, accordingly, wishes to make certain that adequate funds for

[1] Attachment omitted.

operating requirements will be available to owners whose vessels are being operated in the war effort. It is believed that the above arrangements will accomplish this objective without violating the rules laid down by the Comptroller General. Suggestions for further relief will be given prompt consideration. The Administrator will be prepared to confer with owner's representatives during the week of December 21 for this purpose.

W. C. PEET, JR.,
Secretary, War Shipping Administration.

DECEMBER 31, 1942

APPENDIX C

*Letter From Secretary of State to War Shipping Administration, Together With Accompanying Memorandum.**

DEPARTMENT OF STATE,
Washington, April 16, 1943.

Rear Admiral EMORY S. LAND,
Administrator, War Shipping Administration.

MY DEAR ADMIRAL LAND: With reference to previous correspondence and conferences between officers of the War Shipping Administration and this Department in relation to the matter of compensating Danish nationals for vessels requisitioned by this Government pursuant to the provisions of Public Law 101, Seventy-seventh Congress, approved June 6, 1941 (55 Stat. 242), I enclose a memorandum setting forth important considerations which it is believed should be taken into account in connection with the settlement of the claims of the Danish owners.

While the matter is of importance from the standpoint of the international responsibility of this Government with respect to the properties of nationals of foreign countries, it is also of importance from the point of view of the expropriation by foreign governments of extensive properties of American nationals in foreign countries, whose interests we must keep in mind.

Having in mind the foregoing considerations, particularly our international relations, I consider it important that just compensation in the real sense be made to the Danish owners, and that section 902 of the Merchant Marine Act of 1936, as amended, be construed, if possible, so as to bring about this result. I am confident that you will take such steps as may be possible in this direction.

Sincerely yours,

CORDELL HULL.

Enclosure. Memorandum.

---

*Document 20, pp. 167-173.

MEMORANDUM

April 12, 1943

Pursuant to the act approved June 6, 1941 (55 Stat. 242), this Government requisitioned certain immobilized Danish vessels in June 1941. The act provided for the payment of "just compensation" as follows:

"Just compensation should be determined and made to the owner or owners of such vessels in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended."

Section 902(a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1254), provides in part as follows:

"Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.* * * *" [Italics added.]

It appears that the Comptroller General has held, in effect, that irrespective of the value of the Danish ships on the date they were requisitioned (June 1941), the so-called enhancement clause of section 902 (a) "prohibits the payment of compensation for such vessels to the extent that it may be based upon values in excess of the values existing

on September 8, 1939, provided such excess be determined as due to economic conditions directly caused by the national emergency". (Communication of November 28, 1942 to the Administrator, War Shipping Administration).

In his letter of May 1, 1941, to the chairman of the Committee on Commerce, United States Senate, in relation to Senate Joint Resolution No. 67, the Secretary of State stated:

"With regard to the acquisition of immobilized German, Italian, and Danish vessels in American ports, now in protective custody, *it is the view of the Department of State that these vessels should not be condemned without making just compensation to their respective owners.* It is believed that there is adequate authority in international law for this method of acquisition." [Italics added.]

There are also quoted the following excerpts from the record of the hearings on H. R. 4088 and House Joint Resolution 167, relating to this same subject, before the House Committee on the Merchant Marine and Fisheries, April 17-23, 1941, containing the testimony of Mr. Breckenridge Long, Assistant Secretary of State:

"Mr. Oliver. But we are citing as our reason for seizing or requisitioning these ships the necessity of our self-defense, so to speak, and it would appear to me that whether we have been aggressors or whether we have not been aggressors, that when we put ourselves in the same category as a nation that we do consider to be an aggressor, that we are losing something, our own tradition, so to speak.

"Assistant Secretary Long. Well, Mr. Oliver, we are not going to confiscate these vessels; we are going to pay for them and pay what they are reasonably worth.

"Mr. Oliver. I understand that is the situation.

"Assistant Secretary Long. The vessels are there lying idle.

"Mr. Oliver. I agree with that.

"Assistant Secretary Long. We are simply going to take over vessels and make just compensation for them."

Mr. Long's comments were supplemented on page 54 as follows:

"Assistant Secretary Long. We have vessels in protective custody, and they are still the property of foreign interests, and we are proposing to pay for them full value and to use the vessels which have been lying idle, many of which were used formerly in transporting goods to the United States which we now need more than ever."

The Department had in mind, of course, the payment of "just compensation" as heretofore determined by both municipal and international tribunals. As stated by Mr. Justice Butler in delivering the opinion of the Supreme Court in *Brooks-Scanlan Corporation* v. *United States* (265 U. S. 106, 123), it is settled by the decisions of that court that the term "just compensation" in article V of the amendments to the Constitution "is the value of the property taken at the time of the taking."

In its opinion rendered on October 13, 1922, the international tribunal established by the United States and Norway to pass upon the claims of Norwegian nationals arising out of the requisitioning of certain shipbuilding contracts, materials, and ships being built in the United States at the date of their requisition by this Government, the following statement was made with reference to article V of the amendments to the Constitution:

"It is common ground that in this respect the public law of the parties is in complete accord with the international public law of all civilized countries" (American Journal of International Law, vol. 17, pp. 362, 385).

It was added that "just compensation is due to the claimants under the municipal law of the United States, as well as under international law," and that it was "common ground" that such compensation is to be determined in the light of "the fair actual value of the property taken * * * at the time and place it was taken" and "all the surrounding circumstances" (ibid., p. 388).

In administrative decision No. III, rendered on December 11, 1923, the Mixed Claims Commission, United States and Germany, established pursuant to the agreement concluded by the two Governments on August 10, 1922, to adjudicate claims of American nationals against Germany, laid down certain rules with respect to claims "based upon property taken and not returned to private owners." It was said that the measure of damages which would ordinarily be applied was "the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place" (Consolidated Edition of Decisions and Opinions, 1925-26, pp. 61, 63).

On March 11, 1924, the same Commission entered the following order:

"ORDERED, That in all claims falling within the terms of the Treaty of Berlin, based on the destruction of hulls, the measure of damages which will ordinarily be applied is the reasonable market value of the property destroyed in the condition in which it was as of the time and place of destruction, if it had a market value; if not, then the intrinsic value of the property as of such time and place. While the reasonable market value, if there were a true and ascertainable market value, will control, *notwithstanding the market may have been either depressed or inflated by abnormal conditions howsoever produced*, still purely speculative factors will be eliminated as far as practicable in arriving at such market value." [Italics added.]

"The American and German agents and their respective counsel in the preparation and presentation of cases, and the naval experts in the preparation of their reports to the Commission, will be governed accordingly" (ibid., p. 331).

In his report on the work of the Commission, the American agent made the following statements with respect to the matter of determining values pursuant to the above-mentioned order:

"The American agency in the meantime was engaged in gathering and assembling all available statistics as to actual sales of ships during the war period, the opinions of experts on such values, and information regarding the character of ships sold, as to their age, tonnage, physical condition, availability for use, cargo, capacity, and all facts which would have any bearing or materiality in the determination of the question of value.

"During the war it is well known that the values of ships rose enormously. The age of a ship was of slight consequence. There was a tremendous demand for ships of any kind, and the supply was limited. The values fluctuated widely and generally in accordance with the activities of the German submarine warfare. It was an extremely difficult matter to determine the value of a particular ship at a given time, but with the aid of the mass of statistics, tabulated statements of actual sales made prior to, throughout, and subsequent to the World War, charts prepared in accordance therewith showing the fluctuations in the market values of bottoms, and all the information assembled, it was found possible in most cases to arrive at a satisfactory conclusion.

* * * * * *

"As a result of these efforts, consultations, and conferences, the agents of the respective Governments in nearly all of the claims for the loss of hulls were able to present the claims to the Commission upon agreed statements of facts, including an agreed valuation of each ship for which a statement was filed, together with a recommendation for the consideration of the Commission of an amount to be awarded in each case. These recommendations were in each case approved by the Commission and awards entered accordingly" (Report of Robert W. Bonynge, 1934, p. 38):

The agreed statements filed with the Commission with respect to the values and recommendations arrived at by the agents, and on the basis of which the Commission acted, contained the following paragraph:

"IV. The values shown in the attached schedules were arrived at by the comparison with the prices obtained at the sales of American vessels of approximately the same type, age, and tonnage, effected at about the same time of loss of the respective vessels under consideration, they keep generally within the limits of the average rates of the prices paid under such sales, and the particular circumstances influencing the value of the lost vessel have been taken into account in each case" (ibid., p. 40).

Under the Settlement of War Claims Act of 1928 (45 Stat. 254) a war claims arbiter was appointed to hear certain classes of claims of German nationals against the United States. Among such claims were those arising out of the taking over by the United States of certain German vessels. Paragraphs 6 and 7 of section 4 (c) authorized the Secretary of the Treasury, following awards by the arbiter, to pay immediately amounts in the aggregate of 50 percent of the awards authorized to be made "on account of ships, patents, and radio stations." By findings of June 5, 1930, James W. Remick, as arbiter, determined the "fair value" of each of 94 ships, "to the owner, immediately prior to the time exclusive possession was taken by the United States under the authority of the joint resolution of May 12, 1917, in its condition at that time, taking into consideration the fact that such owner could not use or permit the use of such vessel, or charter, or sell, or otherwise dispose of such vessel for use or delivery prior to the termination of the war, and that the war was not terminated until July 2, 1921, including simple interest thereon at the rate of 5 percent per annum from July 2, 1921, to December 31, 1928, both dates inclusive." The fair value of the 94 ships, including interest, was found to be $74,243,000 (American Journal of International Law, vol. 25, p. 139).

In his opinion rendered in connection with the case of *MacAndrews and Forbes Company* (U. S.) v. *the Republic of Turkey*, Commissioner Nielsen stated:

"In *United States* v. *New River Collieries Co.* (262 U. S. 341; 344) the court asserted and applied the following general rule with respect to compensation for the taking of property:

" 'Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation.'

"International tribunals apply the same general rule, which, it is believed, may be taken as a rule of international law as well as of domestic law. It is also believed that, generally speaking, the rule should be and has been applied to arbitrary and unlawful taking or destruction of property. See the *Melczer Mining Company case* in the arbitration between the United States and Mexico under the convention of September 8, 1923, Opinions of Commissioners, Washington, 1929, p. 228" (Opinions and Report, pp. 89-90).

With reference to the limitation inherent in the so-called enhancement clause in section 902 (a) it may be observed that the tribunal established to pass upon the above-mentioned claims of Norwegian nationals against the United States held that, in determining just compensation, it was not bound by certain designated statutes of the United States "nor by any other municipal law, insofar as these provisions restricted the right of the claimants to receive immediate and full compensation, with interest from the day on which the compensation should have been fully paid ex aequo et bono." There are a number of international precedents in support of the principle underlying the tribunal's ruling. I may refer to the following statement made by Secretary of State Bayard in an instruction of November 1, 1887, to Mr. Connery, American Minister to Mexico:

"* * * if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either

to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the Nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its suport." (Foreign Relations, 1887, p. 753.)

In the light of the foregoing precedents it seems clear that under principles of international law and pecuniary liability of this Government with respect to the Danish vessels in question can be fully discharged only by the payment of an amount which will represent "just compensation" in conformity with the decisions of the Supreme Court and international tribunals, that is, an amount determined on the basis of the actual value at the time of taking. If such compensation is not paid and the matter is submitted to an international tribunal for adjudication, it is expected that this Government will be found liable in an amount representing such actual value, plus interest.

Where a statute is open to more than one interpretation the rules of statutory construction require administrative bodies, entrusted with the duty of administering a law, to apply it, if possible, in such manner as to avoid running counter to the Constitution. Statutes should also be construed, if possible, so as not to run counter to our international obligations. This in the case of *McLeod* v. *United States* (229 U. S. 416, 434) the Supreme Court stated:

"The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to

violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law."

In the case of the Steamship *Lotus* before the Permanent Court of International Justice, Mr. John Bassett Moore stated:

"2. It is an equally admitted principle that, as municipal courts, the creatures of municipal law, derive their jurisdiction from that law, offenses committed in the territorial jurisdiction of a nation may be tried and punished there acording to the definitions and penalties of its municipal law, which, except so far as it may be shown to be contrary to international law, is accepted by international law as the law properly governing the case (report of Mr. Bayard, Secretary of State, to the President, case of Antonio Pelletier, January 20, 1887, Foreign Relations of the United States, 1887, p. 606, and the numerous authorities there cited; *Wildenhus' case*, 120 U. S. 1). This principle is not contrary, but it is correlative, to the principle laid down in numerous decisions of municipal courts, that international law is to be considered as forming part of the law of the land, that it is as such to be judicially administered in all cases to which it is applicable, and that municipal enactments ought not to be so construed as to violate international law, if any other construction is possible (Chief Justice Marshall, *Murray* v. *Schooner Charming Betsey* (1804), 2 Cranch 64, 118; Sir William Scott, Le Louis (1817), 2 Dodson 210, 239)" (II Hudson, World Court Reports 20, 68).

Attention is also invited to the following statements of Secretary of State Root in a communication of March 16, 1906, to the Secretary of Commerce and Labor:

"In support of the contention that foreign diplomatic officers are not exempt from the head tax, an opinion of the Attorney General, dated February 20, 1905, is submitted.

"It is not the intention of this Department to impugn or to criticize this opinion; it is however, suggested that

the opinion considers solely the letter of the statute and does not take into consideration the fact that international law is as much the law of the land as is a statute. Nor is the statute interpreted in relation to international law, as is the rule of construction in such cases" (Hackworth, Digest of International Law, vol. IV, 460-461).

In *Schroeder* v. *Bissell, Collector (The Over The Top)* (5 F. (2d) 838, 842), it was said:

"(2) If, however, the court has no option to refuse the enforcement of legislation in contravention of principles of international law, it does not follow that in construing the terms and provisions of a statute, it may not assume that such principles were on the national conscience and that the congressional act did not deliberately intend to infringe them. In other words, unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it."

It is not believed that either the language of the statute in question or its legislative history indicates that it was intended to be in disregard of established international law in relation to the payment of "just compensation" as interpreted and applied by international tribunals.